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THE ROLE OF NGOS IN GIVING ASSISTANCE FOR EXTERNALAND INTERNAL REFUGEES AS A BOUNDARY VIOLATION OF A SOVEREIGN STATE

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THE ROLE OF NGOS IN GIVING ASSISTANCE FOR EXTERNAL AND INTERNAL REFUGEES AS A BOUNDARY VIOLATION OF A SOVEREIGN STATE

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An NGO (Non-Governmental Organization) is a legally constituted organization created by natural or legal persons that operates independently from any form of government, thus is a humanity-value-based organization that provides assistance in a form of charities and voluntary services. These kinds of assistance are much-needed relief for refugees in the countries of armed conflict or not. The most important source of protection for external refugees is Refugees Law while the internal refugees are protected by the National Law. The study presented in this paper is limited to assistance provided by NGOs to external and internal refugees in a country that is not in situations of armed conflict. These limits are given to address whether the role of NGOs providing assistance to refugees can be categorized as a violation of the limit state sovereignty. This level of understanding in the area of theoretical but can be implemented to legitimate the role of NGOs.

Keyword(s): *non-governmental organization, refugee, state sovereignty*

I. THE ABILITY TO CONDUCT INTERNATIONAL RELATIONS

Article 1 of the Montevideo Convention of 1933 on the Rights and Duties of States enumerates these characteristics: "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a Government; and (d) a capacity to enter into relations with other States.

So far as international law is concerned, the qualification (d) is the most important. A state must have recognised capacity to maintain external relations with other states. This distinguishes states proper from lesser units such as members of a federation, or protectorates, which do not manage their own foreign affairs, and are not recognised by other states as fully-fledged members of the international community.[2]

The ability to conduct international relations is a qualification indicates that the country is a sovereign state. However, to conduct official

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[2] J. G. Starke, *Introduction to International Law*, Butterworths,1984, p.92.

relations between states required the recognition. In this case, recognition is defined as the free act of a state that justifies a formation of a power organization and received such an organization as a member of international community. Recognition may be given to the state, governments or non-state entity.

Recognition is important for two reasons. First, at the level of international law, it shows that the recognised state possesses the attributes of statehood and that the recognising state is willing to engage in foreign relations with the recognised state. The recognition of a new government signifies that it is an effective government and that the recognising state expresses its willingness to initiate, or to continue, relations with that new government. State practice also includes the recognition of belligerency. Second, at the level of municipal law, it will usually be entities that are recognised that will be accorded rights and have obligations under the law concerned.[3]

Recognition of a new entity may be defined as a discretionary function exercised unilaterally by the government of a state acknowledging the existance of another state or government or belligerent community. Recognition is the willingness to deal with the new state as a member of the international community or with the new government as the representative of the state. Recognition is a matter of intention and may be express or implied. The act of recognition may be effected expressly, by a formal announcement or by a bilateral treaty of recognition, or, in some circumstances, impliedly through any act indicating an intention to effect recognition.

In terms of setting, recognition is more of a political act than legal act. Recognition is a political act because essentially recognition is an act of choice on the consideration of the interests of countries that recognize. In other words, the election to recognize or not depends on the strategic and mutually beneficial needs and interests.

Recognition is not a legal act because it is not an act of necessity as a result of the fulfillment of the requirements established by law. There is no obligation for a country to give recognition to the power organization that has met the requirements set by international law. Therefore, there is no right for such power organizations to gain recognition from

[3] Alina Kaczorowska, *Public International Law*, Old Bailey Press, 2002, p.71.

other countries. So even though in terms of setting, recognition is more of a political act, but recognition is also a legal action due to its result organized by international law.

A new development in international law is a limited recognition to national freedom movement that allow them to join the UN or other certain international organisation. This kind of recognition is not universal yet, even still rejected since these movements are non-state entity.

A state can be born and live, but it does not mean that it has sovereignty if that state has no capacity to enter into legal relation with other states.

Capacity to enter into legal relations is a requirement that often causes great difficulty. It has been suggested that it denotes "independence", so that a territory cannot be regarded as a state so long as it is under the control, direct or indirect, of another state. Yet, if this is what this criterion means, it is somewhat unrealistic, for there is scarcely a state that does not depend to some degree on the goodwill, financial aid or political support of others.[4]

Are we to say that the territories of Central America are not states because of the influence of their powerful neighbour? It is unlikely, however, that this is what is meant by "capacity to enter into relations". The better view is that this criterion means "legal independence", not factual autonomy. Thus, a "state" will exist if the territory is not under the lawful sovereign authority of another state. In this sense, states with legal independence have the legal capacity to enter relations with other states on their own behalf as a matter of right.

The ability to conduct international relations is a qualification that shows that the country is a sovereign state. Sovereign state has the ultimate power to freely perform various activities according to their interests as long as it does not against international law.

In accordance with the concept of international law, sovereignty has three (3) main aspects: external, internal and territorial. External aspect of sovereignty is the right of every country to freely determine the relationship with different countries or other groups without restraint, pressure or control from other countries. Internal aspect of sovereignty is the right of a country or the exclusive authority to determine the form of

[4] Martin Dixon, *Textbook on International Law*, Blackstone Press Limited,1993, p.92.

its institutions, the workings of these institutions and the right to make laws and actions to comply. Aspects of territorial sovereignty are the sole and exclusive power possessed by the state over individuals and objects contained in the region.

Each state has a prima facie exclusive jurisdiction over a territory and the permanent population living there. States have a duty of non-intervention in the area of exclusive jurisdiction of other state.

Although the state remains the main subject of international law, the role of the next range of new actors such as international organizations, non-governmental organizations and even individuals have also contributed to the development of international law. In addition, there are also demands to regulate the rights and obligations of the various new actors which are not independent from the setting of international law.

The presences of international organizations or intergovernmental organizations are the subject of international law after the state. States as original subjects of international law that established the international organizations. But what about the Non Governmental Organizations (NGOs)? This institution is an institution funded on the initiative of private persons to collect private or public, physical, and moral of various nationalities. The main target of non-governmental organizations is to try to soften, influence or change policy subjects of international law through a range of activities that can be extended to many countries. The role and the formation were not by the state but purely from the private. The problem is that if the roles were done then raises the presumption of intervention in humanitarian relief to refugees in the country, and we know the state as a subject of international law has an obligation to intervene outside of its sovereign territory. So the questions are: Is the provision of humanitarian assistance by NGOs to refugees in a country is a violation of the sovereignty of a country's borders and can NGOs gaining recognition as the new entity as a basis for the legitimacy of its role in international law?

II. NON GOVERNMENTAL ORGANISATIONS

The foundation of international organisations was built in ancient times, but the organisations themselves did not appear until the nineteenth century when they were formed among political structures known as nation-states. Before being linked by these organisations, the nation-state already had diplomatic, economic, legal and war relationships.

The international system as a whole consists of these nation-states, their interactions, international organisations, and the interactions of private actors. As only one part of the whole, internasional organisations are necessarily affected by the other parts. Because these international organisations are new, they have a minor rather than a major influence on world relationships and are shaped by these relationships more than shaping them.

Nevertheless, the idea of international organisation is gradually becoming more complex and influential, as shown by both the words and actions of government spokespeople. Although they may not go so far as to surrender sovereign powers to international organisations, they do find them indispensable for other purposes. New nations demonstrate this in their eagerness to be admitted to the United Nations. Despite great differences, the big powers in the UN do not seem anxious to withdraw, and all countries find the organisation useful for sounding out ideas and for contact with other nations.

The United Nations has a more elaborated structure than the League of Nations did, which in turn was more complex than pre-World War I organisations. At the same time, regional and private international organisations since 1945 also have increased in both numbers and influence. We may assume then that this process will continue, and that international organisations will become an increasingly important part of international relationships.

Modern international organisations may be classified as intergovernmental organisations (IGOs) and NGOs to distinguish international private agencies from those limited to a single country. The common characteristics of both IGOs and NGOs include: (1) a permanent organisation to carry on a continuing set of functions; (2) voluntary membership of eligible parties; (3) a basic instrument stating goals, structure, and methods of operation; (4) a broadly representative consultative

conference organ; and (5) a permanent secretariat to carry on continuous administrative, research, and information functions.[5]

NGOs have become an integral part of the United Nations (UN) system. Following the series of world conferences of the early 1990s, NGOs have increasingly been recognised as influential actors in international relations. Over the years, the UN opened up for more interaction with NGOs and created diverse ways to bring them into their system.

NGOs have in fact become increasingly incorporated into the UN system. More procedures and arrangements have been introduced which officially integrate NGOs and their activities into the operations of the UN. As a result, NGOs have broadened possibilities to work with the UN today.

Enhancing the role of NGOs in the international community also apply to the emergence of human rights NGOs. The role they run focused on providing humanitarian assistance to the various components of world peace programs.

III. HUMAN RIGHTS NON-GOVERNMENTAL ORGANIZATIONS

In response to these developments, human rights NGOs have tried to inject human rights concerns into the decision-making process of establishing and running those peace programmes. Accordingly, they have argued that human rights issues are central to peace agreements and to peacekeeping, and that human rights components should be part of every such peace and other complex field operation that is launched. To accomplish this international human rights NGOs have used a number of advocacy methods with which such groups have typically excelled: to expose facts and report on them publicly; to demand new machinery tailored to meet the needs revealed by the reporting; and to engage directly with government representatives formulating mandates to establish field presences and new machinery, mainly through the United Nations.

Early on, several major non governmental human rights organisa-

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[5] A LeRoy Bennett, *International Organisations Principles and Issues*, Prentice-Hall,1995, p.3.

tions reported on the performance of a series of human rights monitoring operations established as part of the earlier peace processes in El Salvador or the complex peace operations established in former Yugoslavia and Rwanda.

Peace processes of the 1990s opened the door to on-site UN peacekeeping operations containing human rights components, most commonly engaged in monitoring and reporting. With these efforts, often dubbed verification of peace agreements rather than human rights monitoring, that emerged a new human rights product and approach, consisting of more than human rights report written by outside investigators. Training and institution building became a focus of some of these programmes.

Individuals, from government and international institutions on the one hand, and from non governmental organisations, on the other, were involved directly or indirectly in these monitoring and training programmes. Freed from the conference rooms of Geneva and New York, the new human rights field presence programmes have provided:

- monitoring, investigations, and reporting about human rights compliance;
- technical assistance, capacity building and training of local activists;
- protection and security for civilians under threat; and/or
- coordination and facilitation of human rights activities by other international actors outside of the bureaucratic responsibility of the office of the UN High Commissioner for Human Rights, including the Department of Peacekeeping and the Department of Political Affairs.

In the 1980s and 1990s, the NGO movement's information and reporting approach was transferred into the United Nations Commission on Human Rights, the preeminent international human rights deliberative body. Special rapporteurs or working groups of experts were being created within the United Nations human rights machinery and authorized to examine information, including on cases affecting individual victims of human rights abuses, cases of torture, disappearances, political killings and free speech. Human rights treaty bodies were established to monitor and review country reports on their compliance with norms.

In the 1990s, and especially following the end of the cold war, human rights matters moved from the margins to the centre of foreign affairs policy. The emergence of ethnic and religious struggles, genocide in Rwanda and Bosnia, and massive refugee outflows, all brought a search for new solutions through preventive diplomacy and humanitarian intervention.

In this role, NGOs got challenges and issues: Is the provision of humanitarian assistance by NGOs to refugees in a country is a violation of the sovereignty of a country's borders and can NGOs gaining recognition as the new entity as a basis for the legitimacy of its role in international law? The discussion is limited to refugees since they are being selected as an element that describes a situation which involves another country as a transit point or settled for a while. In another dimension, the existence of NGOs that provide humanitarian assistance are not always founded or even composed of the country where the refugees were displaced and settled for a while.

IV. REFUGEES

After World War II the number of refugees, stateless persons and displaced persons reached 21 million. In 1948 the United Nations set up a new body being the International Refugee Organisation (IRO), which replaced the United Nations Relief and Rehabilitation Agency (UNRRA), to deal with the problem. Its main objective was to repatriate refugees. The Cold War made it impossible. Those who had valid objections including persecution, or fear of persecution because of race, religion, nationality or political opinion had to be resettled. The IRO, from its creation until the termination of its mandate in 1951, helped to resettle over one million refugees, repatriated 73,000 and made arrangements for 410,000 internally displaced persons. On 3 December 1949 the General Assembly adopted resolution 319A (IV), creating the UN High Commission for Refugees (UNHCR) as a subsidiary organ of the GA, initially for a period of three years. Since then the mandate of the UNHCR has been extended many times. The UNHCR has its seat in Geneva and has offices in 120 countries. In 2001 it was concerned with 22.3 million people. The main tasks of the UNHCR are:

1. to provide international protection for refugees;

2. to seek permanent solutions for the problems of refugees;
3. to co-ordinate international action in favour of refugees;
4. to promote the conclusion and ratification of international conventions for the protection of refugees and to supervise their application.

The UNHCR in fulfilling its mandate has helped millions of refugees and asylum-seekers by providing international protection and by assisting refugees to restart their lives, either through voluntary repatriation to their home country or resettlement in new countries. In addition, the UNHCR is assisting internally displaced persons in all possible ways.

After World War II it became necessary to regulate the situation of refugees at international level. Under the auspices of the UN an International Conference was convened in Geneva in 1951 which produced the most important international instrument relating to the protection of refugees: the Geneva Convention Regarding the Status of Refugees 1951.

The Convention defines a refugee in its art 1 as any person who:

"... as a result of events occuring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling, to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

The above definition of a refugee clearly establishes five grounds of persecution: race, religion, nationality, membership of a particular group and political opinions. Consequently, not only political persecution (and therefore those who are persecuted because they fight for freedom) but also others may be eligible for refugee status. Thus, the difinition is sufficiently flexible to encompass new types of refugee as they have emerged over the years. However, the 1951 Convention is clear that war criminals are excluded from the benefit of the protection.

The determination of who is entitled to refugee status is left to the contracting states. The UNHCR can provide advice and assistance to

both contracting and non-contracting parties to the 1951 Convention. However, in some cases the UNHCR may determine that a person is entitled to refugee status. A person recognised as a refugee under the 1951 Convention has a right to identity papers and to travel documents.

The 1951 Geneva Convention contains a temporal restriction. This was due to the fact that at the time of the adoption of the 1951 Geneva Convention it was believed that the refugee crisis was a temporal phenomenon resulting from World War II and confined to Europe. In addition, contracting states were given an option to limit the geographical application of the 1951 Convention to Europe. This optimistic view has been challenged by waves of refugees arriving in the late 1950s and 1960s from other parts of the world, in particular from Africa. A Protocol adopted in 1967 lifted both the temporal and the geographical limitations on the application of the 1951 Convention which has since become of universal scope.

Refugee is recognized status by international instruments. Someone who has been recognized as a refugee will be attached to the rights and obligations of law. Before someone is recognized as a refugee, then they will be classified as asylum seekers. Refugee status will be granted by fulfilling the conditions set out in Article 1 of the Convention of 1951. In states that have become party to the Refugee Convention (1951 Geneva Convention Protocol below 1967), then the number of obligations as a form of ensuring the implementation of human rights as stipulated in the Convention is become a logical consequence to the state.

Is the provision of humanitarian assistance to the refugees by NGOs in the country is a violation of the sovereignty of a country's borders and can NGOs gain recognition as a new entity, as a basis for legitimizing their role in international law?

Assessment on refugee problem always contains portions of human rights advocated, because basically the presence of a refugee is due to unguaranteed implementation of human rights in their original countries. Both in terms of issues related to refugees who have fled the country and internally displaced person is because they do not receive protection because of differences in religion, race, nationality, political opinion, or membership in a particular social group.

The existence of the refugee problem from the aspects of the vio-

lation of human rights invites a lot of attention from the actors who appeared in the international community, not apart from NGOs' attention. The presence of NGOs themselves cannot be classified as a new actor, but the role they play in ensuring the implementation of human rights today is more inviting polemic. Pure relief which is initiated and driven by the private sector without any intervention from the government demonstrated that the NGOs acting independently. No unilateral interests and benefits contained in carrying out the humanity activities. Some roles they do actually demand openness and transparency from the states involved in refugee issues. Neither the origin state nor the state of refugees displaced went to seek refuge.

NGOs' role in the humanitarian mission has an absolute requirement of justice. Removing attributes alignments in one country and tries to express reality and what actually happened.

The theory of justice may be divided into two main parts:

1. An interpretation of the initial situation and a formulation of the various principles available for choice there, and
2. An argument establishing which of these principles would in fact be adopted.[6]

Recognizing and accepting the existence and role of NGOs are not a violation of the sovereignty of a country's borders. Human rights issues in refugee problem rise an opinion that human rights is part of the *jus cogens* principle.

V. THE EQUALITY OF INDIVIDUALS AS *JUS COGENS* PRINCIPLE

Jus cogens has been described as the body of those general rules of law whose non-observance may affect the very essence of the legal system to which they belong to such an extent that the subjects of the law may not, under pain of absolute nullity, depart from them in virtue of particular agreements.[7]

Every human being has the same inherent rights called basic rights.

[6] John Rawls, *A Theory of Justice*, Oxford University Press,1971, p. 54.

[7] Warwick McKean, *Equality and Discrimination under International Law*, Oxford University Press,1983, p. 277.

This rights must be enjoyed as long as humans exist and cannot be reduced and eliminated for any reason. Therefore, the law set a principle of jus cogens, i.e. norms that have been accepted and recognized by the international community and should not be revoked or excluded by anyone. The need for something which is considered important in the practice of states and should be arranged to form an opinio juris in the so-called customary international law.There is a growing opinion that some human rights are part of jus cogens. It is very difficult to establish a list of rights which can be classified as jus cogens. The UN Commission on Human Rights has always considered that the prohibition of genocide and slavery are jus cogens. The prohibition of torture ought also to be recognised as jus cogens.The efforts of the international community, including the role of NGOs in ensuring the implementation of human rights requires the full support of any other country that is part of the international community. Guarantee for the implementation of human rights is not only in the form of verbal statements alone, but rather an active role.

It takes the willingness and desire of each country to take an active role, including the recognition and acceptance of the role of NGOs in providing humanitarian assistance. This role should not be viewed as a violation of sovereignty limit. The law is enforced solely justice to all parties regardless of certain limitations. Reports and monitoring transparently can be opened on the basis of the search for solutions rather than exacerbate the problem. So that the parties responsible for receiving reports of facts that happened was indeed an actual parties entitled to it and can provide help in solving them. The principle of non-interference in the area of domestic fixed portion must be maintained and respected for the sustainability of the roles of each actor is incorporated in the international community. It takes the wisdom of each to run.

Recognition of the presence of NGOs in the provision of humanitarian assistance in a country cannot be categorized as an intervention that violates the sovereignty of a country's borders. Therefore, if the NGOs is recognizing in the international community should not misused the trust given for the benefit of certain parties only. Purity of purpose and intent of the assistance provided without any tendency should also be maintained in the NGOs commitment. One should remind that in terms of the setting, recognition is more a political act of the legal act. Rec-

ognition is a political act because basically it is an act of choice on the consideration of the interests of countries that recognize. But in terms of the result, recognition is a legal action due to the result organized by international law.

State may recognize or not recognize the role of NGOs. But as a practical necessity in countries governed so as to form an *opinio juris* in the so-called customary international law, the existence and role of NGOs are important. In providing humanitarian aid as a form of ensuring the implementation of human rights it is necessary to have the support of all state actors that are part of the international community. Thus, in carrying out its role, NGOs would not be overshadowed fears have violated the sovereignty of a country's borders. NGOs just have a few requirements that must be carried out, one of them is respecting the sovereignty of a country.

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